

1992

Rita C. Gum v. James Richard Gum : Brief of Appellant

Utah Court of Appeals

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Glen M. Richman; Attorney for Appellee.

Rita C. Gum; Attorney Pro Se for the Appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

RITA C. GUM,

Plaintiff/Appellant,

vs.

JAMES RICHARD GUM,

Defendant/Appellee.

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Priority No. 16

Case No. 920164-CA

BRIEF OF APPELLANT

AN APPEAL FROM THE ENTIRE JUDGMENT AND DECREE OF DIVORCE
OF THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH

THE HONORABLE JOHN A. ROKICH, PRESIDING

UTAH COURT OF APPEALS

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FILE NO. 920164

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	*	
RITA C. GUM,	*	
	*	
Plaintiff/Appellant,	*	
	*	Priority No. 16
	*	
vs.	*	
	*	
JAMES RICHARD GUM,	*	Case No. 920164-CA
	*	
Defendant/Appellee.	*	
	*	

Jurisdiction in the Court of Appeals is conferred by virtue of Section 78-2a-3 (2) (g), Utah Code Annotated, 1953, as amended. Court of Appeals jurisdiction [Effective January 1, 1988].

The issues presented by this appeal:

1. Is the Amended Decree of Divorce illegal, since legal procedures required by the Utah Code were not followed by the trial court, and should it be declared null and void and accordingly be remanded for proper reconsideration of those issues set forth in the original Order of the Utah Court of Appeals.

2. Who legally owns the house at 5685 South 3650 West, Bennion, Utah, which the parties bought and rented to Jim Gum, James son, who still rents it and resides there, as it is held on a deed as joint tenants by the parties.

3. Did the conduct of the trial court in ignoring the Utah Code, as shown in the transcript, constitute additional judicial bias and misconduct; and should the judge be replaced by the Utah Court of Appeals on remand of the case; so that it may be properly concluded.

STANDARD OF REVIEW

Trial courts have considerable discretion in adjusting the financial and property interest of parties in a divorce, and the decision of the trial court is presumed valid. Ruhsam v. Ruhsam, 742 P.2d 123 (Utah App. 1987). This presumption is overcome where the appellant shows that the trial court misunderstood or misapplied the law resulting in substantial and prejudicial error; or that the evidence clearly preponderated against the findings; or that such a serious inequity occurred so as to manifest a clear abuse of discretion. Id. In determining whether an error has been made by the trial court, the appellate court may review both the facts and the law, Woodward v. Woodward, 699 P.2d 700 (Utah 1985).

DETERMINATIVE STATUTES

The statutes relied upon by the Plaintiff are:

Statutes

1. Section 30-3-3, Utah Code Annotated, (1984), as amended.
2. Section 30-3-5, Utah Code Annotated, 1953, as amended.
3. Section 30-3-6, Utah Code Annotated, 1953, as amended.
4. Section 30-3-7, Utah Code Annotated, 1953, as amended.
5. Section 30-3-10, Utah Code Annotated, 1953, as amended.
6. Section 30-3-10.6, Utah Code Annotated, 1953, as amended.
7. Section 30-4-1, Utah Code Annotated, 1953, as amended.
8. Section 30-4-3, Utah Code Annotated, 1953, as amended.
9. Section 30-6-2, Utah Code Annotated, 1953, as amended.
10. Section 30-6-4, Utah Code Annotated, 1953, as amended.
11. Section 62A-4-502, Utah Code Annotated, 1953, as amended.
12. Section 78-2a-3 (2) (g), Utah Code Annotated, 1953, as amended. Court of Appeals jurisdiction [Effective January 1, 1988].

United States Constitution

13. Section 1, 14th Amendment.

Rules

14. Rule 52, Utah Rules of Civil Procedure.
15. Rule 201 (d), (f), Utah Rules of Evidence.
16. Rule 701, Utah Rules of Evidence.
17. Rule 702, Utah Rules of Evidence.
18. Rule 901, Utah Rules of Evidence.

Cases

19. Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980).
20. Gramme v. Gramme, 587 P.2d 144 (Utah 1978).
21. Paffel v. Paffel, 732 P.2d 96, 436 (Utah 1986).
22. Saint v. Saint, 411 P.2d 683, 196 Kan. 330 (Kan. 1966).
23. Gardner v. Gardner, 512 P.2d 84, 85 N.M. 324 (N.M. 1973).
24. Fite v. Fite, 479 P.2d 560, 3 Wash.App.726 (Wash.App.1970).
25. McCoy v. McCoy, 429 P.2d 999 (Okla. 1967).
26. Countryman v. Countryman, 659 P.2d 663, 135 Ariz.110.
27. Christopher v. Christopher, 381 P.2d 115, 62 Wash.2d 82. (Wash. 1963)
28. Brammer v. Brammer, 471 P.2d 58, 93 Idaho (Idaho 1970).
29. Hofer v. Hofer, 427 P.2d 411, 247 Or. 82 (Or. 1967).
30. Barrett v. Barrett, 403 P.2d 649, 17 Utah 2d1 (Utah 1965).
31. Laws v. Laws, 432 P.2d 632, 164 Colo. 80 (Colo.1967).
32. Montague v. Montague, 510 P.2d 901 (Colo.App. 1973).
33. Foutch v. Foutch, 469 P.2d 2333, 2 Wash. App. 407. (Wash.App 1970)
34. Kelso v. Kelso, 448 P.2d 499, 75 Wash.2d, 24 (Wash. 1968).
35. Wick v. Wick, 489 P.2d 19, 107 Ariz.382 (Ariz. 1971).
36. Hurn v. Hurn, 541 P.2d 360 (Alaska 1975).
37. Matter of Marriage of Clapperton 649 P.2d 620, 58 Or.App. 577 (Or.App. 1982).
38. Wanberg v. Wanberg, 664 P.2d 568 (Alaska 1983).
39. Christiansen v. Christiansen, 667 P.2d 592 (Utah 1983).
40. Nesmith v. Nesmith, 540 P.2d 1229, 112 Ariz. 248 (Ariz. 1975).
41. In re Marriage of Manzo, 659 P.2d 669 (Colo. 1983).
42. Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988).
43. Ruhsam v. Ruhsam, 742 P.2d 123 (Utah App. 1987).
44. Wiese v. Wiese, 699 P.2d 700 (Utah 1985).

45. Fischer v. Fischer, 443 P.2d 463, 92 Idaho 379 (Idaho 1968).
46. Hansen v. Hansen, 537 P.2d 491 (Utah 1975).
47. Carter v. Carter, 379 P.2d 311, 191 Kan.
48. Despain v. Despain, 610 P.2d 1303 (Utah 1980).
49. Dehm v. Dehm, 5545 P.2d 525 (Utah 1976)
50. Olson v. Olson, 704 P.2d 564 (Utah 1985)
51. Newmeyer v. Newmeyer, 745 P.2d 276 (Utah 1987).
52. Jones v. Jones, 700 P.2d 1072 (Utah 1985).
53. Jones v. Jones 700 P.2d 1075 (Utah 1985).
54. Canning v. Canning, 744 P.2d 325 (Utah App. 1987).
55. Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989).
56. Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988)
57. English v. English, 565 P.2d 409 (Utah 1977).
58. Talley v. Talley, 739 P.2d 83 (Utah App. 1987).
59. Bushell v. Bushell, 649 P.2d 85 (Utah 1982).
60. Haslam v. Morrison, 113 Utah 14, 190 P.2d 520. 523 (1948).
61. Heltman v. Heltman, 511 P.2d 720 (Utah 1973).

STATEMENT OF THE CASE

1. The record in this case is voluminous due in large part to the fact that the plaintiff did not have funds to move from her home on H Street. Substantial portions of the record deal with this issue and no provisions of funds were made to help her move.

2. At the conclusion of what appears to be a very unorthodox and disjointed trial proceeding, the trial court allowed the defendant's attorney, Glen M. Richman, to prepare the Findings of Fact and Conclusions of Law, as Attorneys for Plaintiff which alone should make the divorce invalid. The Findings of Fact and Conclusions of Law, was handed to the plaintiff in court, September 6, 1990, the day of the trial with no opportunity before-hand to read it.

3. On October 4, 1990, Appellant filed a Notice of Appeal. No Cross-Appeal was filed.

4. The divorce case was first appealed to The Utah Court of Appeals from a final Decree of Divorce of the Third Judicial District Court entered

on September 10, 1990. Case No. 900528-CA. Before Judges Orme, Greenwood, and Russon (Rule 31 Hearing).

5. The Court remanded the case for reconsideration, stating:

"However, the record contains insufficient evidence to support the court's finding #17 regarding costs and fees and the court's finding regarding defendant's pension. See Briggs v. Holcomb, 740 P.2d 281, 283 (Utah Ct. App. 1987); Birch v. Birch, 771 P.2d 1114, 1116-17 (Utah Ct. App. 1989). Accordingly, we remand for reconsideration of those issues. If, having decided those issues, the court determines some adjustment to other aspects of the property distribution is in order, the court has the discretion to make such adjustments."

6. The case was remanded to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah. The Honorable John A. Rokich, Judge presiding.

Rita C. Gum, as Plaintiff, filed an Affidavit of Prejudice, stating:

I am the plaintiff in the above-entitled cause, and I cannot have a fair and impartial trial before the Honorable John A. Rokich, Judge of the Third District Court, before whom this action is now pending, for the reason that the Honorable John A. Rokich is biased and prejudiced against this affiant, as hereinafter more particularly alleged.

7. The record shows that this matter was not handled by the court as required in accordance with the Utah Code.

8. The trial court forced the plaintiff to attend court, October 17, 1991, under threat of contempt in regards to child custody of Amy Charmaine Gum. Then changed the purpose of the hearing "to schedule an evidentiary hearing to get this matter resolved." (Tr. 1).

9. The court preceded to improperly set a hearing which the court had no right, in law, to set and then proceeded with the hearing without the plaintiff present. The plaintiff did not appear at the November 1, 1991

hearing as the matter of Judge Michael R. Murphy's ruling on the prejudice charge was not completed. (Tr. 24). The law clearly states that the judge can not proceed until this procedure is completed. Judge Murphy's Order is dated December 3, 1991. The hearing was plainly illegal as it was held before the order was issued.

10. The transcript again shows the prejudice of the Honorable John A. Rokich who ignored issues of the remand of The Utah Court of Appeals.

11. Glen M. Richman, the Attorney for the defendant prepared Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce which ignored issues of the remand of The Utah Court of Appeals.

12. This second appeal is from this final Amended Decree of Divorce of the District Court of the Third Judicial District entered on/or about February 14, 1992. The Decree is clearly illegal.

STATEMENT OF FACTS

Marital History

The parties were married on March 24, 1982 , in Salt Lake County, State of Utah (p. 2, par. 2 - Record on Appeal).

Rita was 46 years of age and James was 52 when they were married.

During the marriage relationship, the parties have acquired investments which should be equitably divided (p. 3, par. 8 - Record on Appeal).

Rita is the mother of two minor children who were adopted by defendant and are considered to be issue of the marital relationship, to wit: Amy Charmaine Gum (DOB 3/14/75) and Joy Charmaine Gum (DOB 9/22/76) (p.2, par. 3 - Record on Appeal).

On March 8, 1990, Rita filed a Complaint for divorce (pp. 2-4,- Record on Appeal).

Defendant moved out of the parties' place of residence (p. 7, par. 2 - Record on Appeal).

Defendant failed to provide for any expenses for plaintiff such that the house payment and all utilities will remain unpaid, if they are not paid by defendant (p. 7, par. 3.- Record on Appeal).

Defendant took plaintiff's name off all bank accounts and has withheld all marital assets and money from plaintiff except her part-time employment at the Hilton Hotel from which she earns \$300 to \$400 per month (p. 7, par. 4 - Record on Appeal).

Plaintiff needed the home and furnishings to care for the children and \$540.00 per month as temporary child support (p. 7, par. 5 - Record on Appeal).

Rita is a fit and proper parent who should be awarded the care, custody and control of the minor children subject to defendant's reasonable visitation (p. 3, par. 5 - Record on Appeal).

Defendant should maintain all health, accident and life insurance policies preserving the currently named beneficiaries until the youngest child reaches age 18. (p. 3, par. 13 - Record on Appeal).

Rita is entitled to retirement income from defendant's employment when she is age 60, said retirement should be ordered by the Court (p. 3, par. 9 - Record on Appeal).

On March 26, 1990, James filed an Answer and Counterclaim (pp. 12 - 27 - Record on Appeal).

ERA - Carlson & Company, Realtors, letter dated April 5, 1990:

Rita Gum has been most cooperative in trying to get her home sold. She has provided a key for the front door, which is

in a Realtors' key box. This makes the house accessible to all Realtors at any time.

Rita has kept the property in a show-able condition and agreed to a price reduction in order to try to get the home sold (p. 188 - Record on Appeal).

In May 1990 Rita received a copy of Order on Order to Show Cause and Objections to Commissioner's Recommendation. ORDERS as follows:

The plaintiff shall vacate the parties home on or before the 20th day of May, 1990 and the defendant shall take possession thereof (p. 62, par. 2 - Record on Appeal).

This order should clearly be a violation of Rita's and the minor children's rights under the 14th Amendment of Section 1 of the United States Constitution as quoted (p. 44, par. 3 - Record on Appeal).

The home was jointly owned by Rita and James as well as the one at 5685 South 3650 West, Bennion, Utah, (A-2), which they bought and rented to Jim Gum, James son.

Commissioner Peuler was also influenced by the fact that defendant was living in his son's home (the son was not there). He was not making any rental or mortgage payments on the home and was thus enjoying free housing (p. 51, par. 8 - Record on Appeal).

The rental agreement was and still is making the mortgage payments and James is still living there.

Commissioner Peuler stated that it would be in the best interests of the children for plaintiff and the children to stay in the home until the home is sold (p. 50, par. 5 - Record on Appeal).

The Court's ruling that plaintiff move out of the home in Twenty days is not reasonable due to the fact that the children are in school until June 8

and such a move would disrupt the children's school and social activities (p. 51, par. 9 - Record on Appeal).

On the 25th day of May, 1990 Rita was deposed and during said deposition she put her physical and medical condition into issue. She made a claim for alimony in her Complaint (p. 98, par. 2 - Record on Appeal).

Mr. Welker was sent a copy of the deposition notices and a letter dated May 30, 1990 which in part says:

It appears it will be necessary to take the depositions of Dr. Keith and Dr. Maddock. (p. 99, par. 4 - Record on Appeal).

Rita received a Notice of Withdrawal of Counsel dated 31 day of May, 1990 ---- on the grounds that he is permanently moving to California (p. 79,- Record on Appeal).

Earl S. Spafford and L. Charles Spafford of the firm of Spafford and Spafford enter their appearance as her counsel June 12, 1990 (p. 81,- Record on Appeal).

There after it appears that Mr. Spafford entered an appearance signed the 12th day of June, presented an Ex Parte Motion to a judge not assigned to the case for a protective order, and received an Ex Parte Protective Order and Stay without any notification to plaintiff's counsel. (p. 100, par. 6 - Record on Appeal).

Dr. Robert K. Maddock Jr., M.D. was served Subpoena Duces Tecum on 13 June 90 (p. 120 - Record on Appeal).

Dr. Thomas B. Keith, M.D. was not available for service (p. 117,- Record on Appeal).

Rita through her attorney Earl S. Spafford requests of the court oral argument on her Motion for Stay of Proceedings and for Rehearing, June 18, 1990 (p. 145,- Record on Appeal).

Despite the Order requiring the plaintiff to move from the home by the 20th day of May, she has refused to do so and is in disobedience of the Court Order, and remains in said home (p. 99, par. 3 - Record on Appeal).

Defendant moves the Court for an Order to Show Cause requiring the plaintiff to show cause, if any she has, why she should not be required to immediately vacate the parties' home as required by earlier Court Order, and upon her failure to do so, why she should not be held in contempt and punished accordingly (p. 102, par. 13 - Record on Appeal).

Defendant desires to have the medical records for the claimed treatment of plaintiff which she has put in issue, unless plaintiff forever waives any claim to alimony (p. 102, par. 11 - Record on Appeal).

Defendant, James R. Gum, purchased a home in 1970 with his first wife who is now deceased. The majority of dispute in this action appears to revolve around the house which was clearly premarital property of the defendant (p. 122, par. 1 - Record on Appeal).

But, this house became jointly owned by the two parties when they took a new mortgage on it making Rita also responsible for the payments.

Defendant has agreed that any money additions accrued to his retirement during the marriage of the parties should be divided equally between the parties (p. 123, par. 9 - Record on Appeal).

Plaintiff is impecunious. She has no resources with which to pay the costs of moving and no present ability to provide substitute housing for the minor children of the parties. Plaintiff is 54 years of age and in fragile health. (p. 148, par. 6 - Record on Appeal).

Plaintiff made diligent inquiry in an effort to find adequate housing for herself and daughters without success. In this regard she has inquired as to public shelters and was informed that housing is available only for a short term basis (p. 148, par. 7 - Record on Appeal).

To move said minor children into a shelter environment would impact upon their schooling, their church activity, their social relationship and their welfare, and would not be in their best interest (p. 148, par. 6 - 8 - Record on Appeal) (Emphasis added).

Plaintiff, Rita C. Gum, is to vacate the home of the parties where she has been residing, located at 655 H Street, Salt Lake City, Utah, within ten (10) days from the 11th day of July, 1990; that on or before the 21st day of July, 1990 (p. 167, par. 1 - Record on Appeal).

Immediately after the date the plaintiff vacates the home, the defendant may occupy the home for a period of thirty (30) days for the purpose of getting the home ready for sale. The defendant must vacate the home within thirty (30) days from his occupancy and the home must be sold within thirty (30) days thereafter (p. 168, par. 2 - Record on Appeal).

The depositions of Dr. Keith and Dr. Maddock may be taken, and the records obtained (p. 168, par. 3 - Record on Appeal).

The difference in the refund from the two returns, that is the savings or additional refund received by filing joint return, is to be paid over to the plaintiff (p. 168, par. 4 - Record on Appeal).

The court, having received Motion for an Order to withdraw, good cause appearing therefore, it is hereby ORDERED:

Earl S, Spafford of the firm of SPAFFORD & SPAFFORD, a Professional Corporation, attorneys for the Plaintiff, Rita Gum, are to withdraw as attorney of record in the above

entitled matter. Dated this 30 day of July, 1990 (p. 165 - Record on Appeal).

Rita sold the house herself at a "give away price" of One Hundred and Eighteen Thousand Dollars (\$118,000). She had two appraisals of over Two Hundred Thousand Dollars (\$200,000).

Rita filed a Supplement to Complaint and Partial Response to Defendant's Counter Offer, of July 25, 1990:

My attorneys have withdrawn, and I am so depleted financially that I am unable to incur further attorney's expenses, and therefore choose to represent myself and file this for myself (p. 173 - Record on Appeal).

She was also exhausted and depleted emotionally. She was willing to do almost anything to get the divorce over with. She was willing to let James be awarded the divorce. Let him have custody of the children — if they choose. She had sold the family home herself — or gave it away; let the court decide how to divide the money. She was agreeable in letting the court determine the amount of child support. She only requested "that the court, after full examination and consideration, resolve them as his sense of equity and justice dictate."

What did the court's sense of equity and justice dictate?

Rita was handed the Trial Brief, in court by Glen M. Richman, the Defendant's Attorney, with no chance to read it beforehand.

It is headed:

Glen M. Richman, (2757)
RICHMAN & RICHMAN
Attorneys for Plaintiff

RITA B. GUM
Plaintiff,

Can Mr. Richman represent both parties legally in Utah? Isn't this a conflict of interest? Maybe not. But isn't it like having the fox guard the hen-house (p. 178 - Record on Appeal)?

The Decree for Divorce was headed the same way, the first paragraph read:

1. Defendant is hereby awarded a Decree of Divorce upon the grounds of irreconcilable differences, to be final upon entry (p. 201, par. 1. - Record on Appeal).

This clause could be expected from the Attorney for the Defendant.

The Trial Brief, which is headed, Attorneys for Plaintiff, is signed by GLEN M. RICHMAN, Attorney for Defendant (p. 182 - Record on Appeal) [Emphasis added]

Judge John A. Rokich changed this paragraph (handwritten) to read:

1. Plaintiff and Defendant are hereby awarded a mutual Decree of Divorce upon the grounds of irreconcilable differences, to be final upon entry (p. 201, par. 1. - Record on Appeal).

On October 4, 1990, Appellant filed a Notice of Appeal. No Cross-Appeal was filed.

The divorce case was first appealed to The Utah Court of Appeals from a final Decree of Divorce of the Third Judicial District Court entered on September 10, 1990. Case No. 900528-CA. Before Judges Orme, Greenwood, and Russon (Rule 31 Hearing).

The Court remanded the case for reconsideration. The case was remanded to the District Court of the Third Judicial District in and for Salt Lake County, State of Utah. The Honorable John A. Rokich, Judge presiding.

A final Amended Decree of Divorce of the Third Judicial District Court entered on/or about February 14, 1992.

The case was then appealed to the Supreme Court of the State of Utah on March 12, 1992 and was transferred to The Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

This second appeal is from a final Amended Decree of Divorce of the Third Judicial District Court entered on/or about February 14, 1992.

No Cross-Appeal has been filed.

The case was first appealed from a final Decree of Divorce of the Third Judicial District Court entered on September 10, 1990. Case No. 900528-CA. Before Judges Orme, Greenwood, and Russon (Rule 31 Hearing). It was remanded for reconsideration of certain issues which were not reconsidered by the trial court.

SUMMARY OF ARGUMENTS

POINT I:

Is the Amended Decree of Divorce illegal, since legal procedures required by the Utah Code were not followed by the trial court, and should it be declared null and void and accordingly be remanded for proper reconsideration of those issues set forth in the original Order of the Utah Court of Appeals. (A-1).

POINT II:

Who legally owns the house at 5685 South 3650 West, Bennion, Utah, which the parties bought and rented to Jim Gum, James son, who still rents it and resides there, as it is held on

a deed as joint tenants by James Richard Gum and Rita C. Gum.
(A-2).

POINT III:

Did the conduct of the trial court in ignoring the Utah Code, as shown in the transcript, constitute added judicial bias and misconduct; and should the judge be replaced by the Utah Court of Appeals on remand of the case; so that it may be properly concluded. (Entire transcript).

ARGUMENTS

POINT I:

Is the Amended Decree of Divorce illegal, since legal procedures required by the Utah Code were not followed by the trial court, and should it be declared null and void and accordingly be remanded for proper reconsideration of those issues set forth in the original Order of the Utah Court of Appeals. (A-1).

Rule 63(b) of the Utah Rules of Civil Procedure is very clear in the matter of disqualification of a judge:

"Whenever a party to any action or proceedings, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceedings is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like

jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question,"
Emphasis added.

There was not a hearing held of the Appellant before the Honorable Judge Michael R. Murphy ("except to call in another judge to hear and determine the matter "). Judge Murphey's Order, dated December 3, 1991, states"

It is therefore ordered that the matter is referred back to the assigned judge for resolution. (A- 3).

This Order came to late in the case. The Honorable John A. Rokich had denied removal of the cause to another judge until after the hearings of October 17, 1991 and November 1, 1991. Therefor any order or judgment based on evidence taken by the judge at these hearings is ineffective against the Appellant.

Effect of Affidavit. If after a party files an affidavit of bias or prejudice, a judge denies removal of the cause to another judge, as contemplated by Subdivision (b), any order or judgment based on evidence thereafter taken by the judge is ineffective against the affiant. *Anderson v. Anderson*, 13 Utah 2d 36, 368 P.2d 264 (1962).

This cause came before the Honorable John A. Rokich for a second trial after remand by the Utah Court of Appeals for reconsideration of issues on an appeal by the Appellant taken from a Decree of Divorce from the above-named Appellee. It is the rule in at least one jurisdiction that the original trial judge is disqualified to sit on retrial after a mistrial or reversal when the circumstances and conditions surrounding the litigation are of

such nature that they might cast doubt and question as to the fairness or impartiality of any judgment the trial judge may pronounce, even though he is not conscious of any bias or prejudice.

In *Re Estate of Hupp* (1955) 178 Kan 672, 291 P2d 428, the petition for disqualification was denied by the trial judge, the case again proceeded to trial, and the court again made findings of fact and conclusions of law substantially similar to its findings on the first trial. On appeal, the action of the trial judge in refusing to disqualify himself was specified as error.

The court stated that the basic principal upon which the disqualification statute rested is the purpose of the law that no judge shall hear and determine a case in which he is not wholly free, disinterested, impartial, and independent. The corollary of this rule, held the court, is that when circumstances and conditions surrounding litigation are of such nature that they might cast doubt and question as to the fairness or impartiality of any judgment the trial judge may pronounce, such judge, even though he is not conscious of any bias or prejudice, should disqualify himself and permit the case to be tried before a judge pro tem. Remarking that it is the duty of the Supreme Court to maintain and safeguard the right of trial by a fair and impartial tribunal, and to be vigilant in seeing to it that every possible semblance of reasonable doubt or suspicion on that question is removed and eliminated to the end that justice may be properly administered, and the court concluded that under the composite or collective impression gained by careful consideration of the situation as it existed at the time of the judge's overruling of the petition for disqualification, it would have been better for all parties concerned, and conducive to the best interests of the

judiciary in general, if the trial judge had sustained the petition for disqualification, and held that it was error for him to have refused to do so.

POINT II:

Who legally owns the house at 5685 South 3650 West, Bennion, Utah, which the parties bought and rented to Jim Gum, James son, who still rents it and resides there, as it is held on a deed as joint tenants by James Richard Gum and Rita C. Gum. (A-2).

James testified at the first trial as follows:

Q (By Mr. Richman) Mr. Gum, when you were married to your first wife did you purchase a home?

A. Yes, I did.

Q Where is that home?

A. 635 H Street here in Salt Lake City.

Q And whose money did you use to purchase that home?

A. My money.

Q And is that where the plaintiff is residing at the time?

A. Yes.

Q Was the house remodeled after you married this present wife, Rita Gum?

A. Yes, it was.

Q And whose money was used to remodel the house?

A. My money.

Q Was it from your earnings at work?

A. Earnings, my earnings.

Q And savings?

A. And savings.

Q And was there any money at the time provided to you by Rita Gum, the plaintiff in this action, to remodel or purchase anything toward the upkeep of this house?

A. None whatsoever. (Tr. p. 3, line 24 - 25; p. 4, line 1 - 24).

There were three mortgages, taken in the names of the parties for funds to do the remodeling, causing the property to be held jointly.

Proffer by Mr, Spafford as follows:

Mr. Spafford: Let me make a proffer, your honor, to save a lot of time.

My proffer is that she earns less than \$600 a month; he earns \$3,000 month. This couple has two homes. The one is the exhibit 9-P, which is the home they're living in. It is owned jointly by them, and while admittedly it was acquired prior to the marriage, during the marriage from marital assets the home was remodeled. Indeed it was conveyed to her jointly with him, so she's has an equitable interest in the property.

They have a second piece of property in Salt Lake County, the lot 72, Whitewood Estates, another home which is also deeded to the two parties jointly, Mr. Gum has placed, under a rental agreement, his son in the second piece property, and he is collecting the rent on it, (A-2).

So effectively, your order dispossesses her of the home she's living in and effectively grants him the possession of both pieces of property, two homes [Emphasis added]

So we have the ludicrous situation of a woman who earns a poverty level wage, who has no place to go, and who has a equity in two separate pieces of property; and the husband winds up with both pieces of property while she's effectively put out on the street (Tr. p. 20, 21 -25; p. 21). [Emphasis added]

In re Marriage of Kittleson 585 P.2d 167, 21 Wash.App. 344

(Wash.App. 1978). the court stated:

In marriage dissolution action, it is trial court's duty to characterize property of parties as community or separate, and

to dispose of all property of parties which is brought to its attention.

In another Washington case Lynn v. Lynn 480 P.2d 789, 4 Wash.App. 171 (Wash.App. 1971) the court stated:

Although trial court is not in a divorce proceeding required to award all separate property to the party acquiring it or to divide community property equally, the court does not have unfettered freedom to exercise its personal judgment. RCWA 26.08-110.

Disposition of property is cited in Section 30-3-5, Utah Code Annotated, 1953, as amended.

In a Wyoming case Kane v. Kane 577 P.2d 172 (Wyo. 1978) the court stated:

In a divorce proceeding the disposition of property of the parties is an equitable function of the court.

Both homes of the parties were held in joint tenancy. In the Arizona case of Nesmith v. Nesmith 540 P.2d 1229, 112 Ariz. 248 (Ariz. 1975). it is stated:

Joint tenancy property is to be divided equally by trial court in divorce. A.R.S. § 25-318.

In making a division of marital property in a divorce proceeding, the trial Court is governed by general principles of equity. Title 30 Chapter 3, Section 5, Utah Code Annotated, 1953, as amended, Land v. Land, 605 P.2d 1248.

This writer submits that there is no semblance of equity in awarding of the other home to the Respondent with no part of that asset to the Appellant.

This matter was not settled in the second trial and entered in the Amended Decree of Divorce. Nor was the matter of other mutually owned assets addressed.

POINT III:

Did the conduct of the trial court in ignoring the Utah Code, as shown in the transcript, constitute added judicial bias and misconduct; and should the judge be replaced by the Utah Court of Appeals on remand of the case; so that it may be properly concluded. (Entire transcript).

The transcript of the first trial begins:

Salt Lake City, Utah; Wednesday, July 11, 1990 (3:00 P.M.)

The Court: Do you think we are going to finish this by five o'clock? (Tr.. p. 1, lines 20 - 21). [Emphasis added].

Mr. Richman: Oh, sure.

Q (By Mr. Spafford) Let me put it this way. Where would you go if you moved out?

A. I don't have anyplace to go. [Emphasis added].

The Court: That's immaterial. [Emphasis added].

Mr. Spafford: It goes to the issue of contempt, your Honor.

The court: Let's find out why she doesn't move out, not where she's going to go. [Emphasis added].

Q (By Mr. Spafford) Why haven't you moved out?

A. I don't have anyplace to go. I don't have any money to go anyplace. (Tr. p. 20, lines 2 -13). [Emphasis added].

The Court: We're going to waste a lot of time here. I can sort it out. I told you in the first instance I'm inclined to have her move out of the

house: They haven't shown me any reason why she shouldn't be out. So, I'm not convinced that the fact that she hasn't any place to go is any reason that I should not enforce the order. So, you know-- (Tr. p. 25, lines 16 - 22). [Emphasis added].

Had the court not decided the issue before hearing the testimony, and was not willing to take the time to hear the testimony? Can a court make an unbiased and unprejudiced decision without weighing the testimony of moving a person out of their home against their rights under the 14th Amendment of Section 1 of the United States Constitution?

In a similar case, the Utah Supreme Court stated:

We offer the general philosophy expressed in Haslam v. Morrison, 113 Utah 14, 190 P.2d 520. 523 (1948) Justice Wolfe, writing for the court, stated: The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts.' Justice Wade in a concurring opinion stressed this point when he wrote: 'One of the most important things in government is that all persons subject to its jurisdiction shall always be able to maintain a fair and impartial trial in all matters of litigation in the courts. It is nearly as important that the people have absolute confidence in the integrity of the courts. I can think of nothing that would as surely bring the courts into disrepute as for a judge to insist on trying a case when one of the litigants believes that such judge is biased and prejudiced against him'." Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987).

The same pattern of contempt was followed in the second trial as is shown by the transcript.

It is respectfully urged that the foregoing conduct constitutes judicial bias and an error in law and should not be condoned by this Court.

CONCLUSION

The trial court erred in awarding the Decree of Divorce. The Amended Findings of Fact and Conclusions of Law and the Amended Decree of Divorce, should be declared null and void.

That the case should be remanded to the trial court before a new judge; with a similar Order to the previous one, only more clearly setting out the ruling of the Court of Appeals

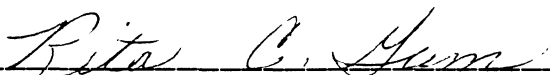
The Appellant should have the opportunity to be awarded a fair and equitable division of all marital property in a new trial with a fair judge who will abide the law.

Attorney's fees should be considered by the trial court. Considering the ability of Appellant to pay those fees and the cost of two appeals. Rita's disposable income is far less than James' as well as being less stable.

In addition, she should have the opportunity to be awarded her interest in all mutual property, including the house in Bennion, and the Appellee's retirement program.

Appellant respectfully requests that the relief requested be granted.

Respectfully submitted this 16th day of November, 1992.



Rita C. Gum
Attorney Pro Se for the Appellant

CERTIFICATE OF SERVICE

I hereby certify I caused four true and correct copies of the Brief of Appellant to be hand-delivered to the following counsel of record on this 16th day of November, 1992.

GLEN M. RICHMAN, ESQ. (2752)
RICHMAN & RICHMAN
Attorney for Defendant/Appellee
60 South 600 East, Suite 100
Salt Lake City, Utah 84102
Telephone: (801) 532-8844



Rita C. Gum

ADDENDUM

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MAY 23 1991

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Rita C. Gum,)	
)	ORDER
Plaintiff and Appellant,)	
)	
v.)	
)	
James Richard Gum,)	Case No. 900528-CA
)	
Defendant and Appellee.)	


Before Judges Orme, Greenwood, and Russon (Rule 31 Hearing).

Based on the evidence in the record and, in particular, plaintiff's concessions as set forth in the document she filed with the court styled by her a supplemental complaint, we affirm the trial court's findings and conclusions regarding alimony, child support, the grounds for granting the divorce, and the real property and sale proceeds.

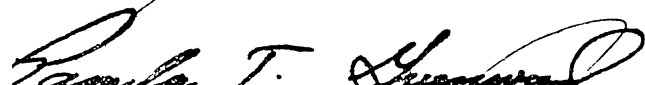
However, the record contains insufficient evidence to support the court's finding #17 regarding costs and fees and the court's finding regarding defendant's pension. See Briggs v. Holcomb, 740 P.2d 281, 283 (Utah Ct. App. 1987); Birch v. Birch, 771 P.2d 1114, 1116-17 (Utah Ct. App. 1989). Accordingly, we remand for reconsideration of those issues. If, having decided those issues, the court determines some adjustment to other aspects of the property distribution is in order, the court has the discretion to make such adjustments.

Dated this 23rd day of May, 1991.


ALL CONCUR:



Gregory K. Orme, Judge



Pamela T. Greenwood, Judge



Leonard H. Russon, Judge

4515003

Recorded at Request of _____
at _____ M. Fee Paid \$ _____
by _____ Dep. Book _____ Page _____ Ref. _____
Mail tax notice to _____ GRANTEE _____ Address 5685 So. 3650 W.
West Valley City, Utah 84118

WARRANTY DEED

VAL R. COVERSTONE and TERESE D. COVERSTONE grantor
of SALT LAKE CITY, County of SALT LAKE, State of Utah, hereby
CONVEY and WARRANT to

JAMES R. GUM and RITA C. GUM, husband and wife, as joint tenants

of Salt Lake City, County of Salt Lake, State of Utah grantee
TEN AND NO/100 and other good and valuable considerations-----DOLLARS,
for the sum of

the following described tract of land in SALT LAKE County,
State of Utah:

Lot 72, WHITEWOOD ESTATES NO. 2, according to the official plat thereof, recorded
in Book 79-2 of Plats at Page 48, records of Salt Lake County, Utah.

Subject to a Trust Deed in favor of Western Mortgage Loan Corporation dated
September 4th, 1986 in the original principal amount of \$69,857.00 which Trust
Deed the grantees herein assume and agree to pay.

The grantors herein assign to the grantees herein all of their right, title
and interest in and to the tax and insurance reserves.

4515003
28 AUGUST 87 04:52 PM
KATIE L. DIXON
RECORDER, SALT LAKE COUNTY, UTAH
GUARDIAN TITLE
REC BY: REBECCA GRAY, DEPUTY

Subject to current general taxes, easements and restrictions.

WITNESS, the hand of said grantor, this X 26th day of
August, A. D. 19 87

Signed in the Presence of

VAL R. COVERSTONE

TERESE D. COVERSTONE

STATE OF WYOM, TEXAS

County of El Paso

ss.

On the 26 day of August, A. D. 1987
personally appeared before me VAL R. COVERSTONE

the signer of the within instrument, who duly acknowledged to me that he executed the
same.

Notary Public.

My commission expires 10/1/88 Residing in El Paso, TX

BLANK #101-WARRANTY DEED-© GEM PRINTING CO - SALT LAKE CITY

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SEP 15 1987

DISTRICT COURT
Third Judicial District

DEC 03 1991

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RITA C. GUM,	:	ORDER
Plaintiff,	:	CIVIL NO. 904901065
vs.	:	
JAMES RICHARD GUM,	:	
Defendant.	:	

This matter was referred by the assigned judge under Rule 63(b), Utah Rules of Civil Procedure, to the presiding judge. The latter has reviewed the file, and determines that the affidavit of bias and prejudice is legally insufficient and specifically notes that neither a transcript nor references to specific pages of a transcript were provided in support of the affidavit.

It is therefore ordered that the matter is referred back to the assigned judge for resolution.

Dated this 3rd day of December, 1991.

151 Michael R. Murphy
MICHAEL R. MURPHY
PRESIDING JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order, to the following, this 7th day of December, 1991:

Rita C. Gum
Pro se
1034 East 900 South
Salt Lake City, Utah 84105

Glen M. Richman
Attorney for Defendant
60 South 600 East, Suite 100
Salt Lake City, Utah 84102

